AUG 31 1981
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981
No. 81-5143

MILLICENT LINDEN,

Plaintiff-Appellant,

-against-

DIAL PRESS and OLGA LEY, HARPER AND ROW PUBLISHERS, INC., ST. MARTIN'S PRESS and SIDI HESSEL,

Defendants-Appellees.

ORIGINAL COPY

On Appeal from the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York

MOTION TO DISMISS OR TO AFFIRM

Defendants-Appellees ST. MARTIN'S PRESS, INCORPORATED ("St. Martin's") and SIDI HESSEL ("Hessel") move this Court, pursuant to Rule 16 of the Rules of the Supreme Court, to dismiss the appeal herein with respect to them on the grounds hereinafter set forth, or to affirm the judgment of the Court of Appeals for the Second Circuit sought to be reviewed on this appeal with respect to them, on the ground that it is manifest that the questions on which the decision of this cause depend are so insubstantial as not to need further argument.* In addition, if this Court should treat the papers of the Plaintiff-Appellant as a petition for a writ of certiorari, pursuant to 28 U.S.C. §2103, that

* On this appeal, Plaintiff-Appellant Linden also seeks to appeal the judgments against her by the Court of Appeals for the Second Circuit in two other actions: Linden v. Dial Press and Olga Ley, Docket No. 81-7245 and Linden v. Harper and Row Publishers, Inc., Docket No. 81-7243. The two other actions involve similar attempts by Plaintiff-Appellant to relitigate claims of copyright infringement.

petition should be denied.

This appeal, the second against Defendants-Appellees St. Martin's and Hessel and at least the fourth of Plaintiff-Appellant to reach this Court regarding alleged infringement of the works of the Plaintiff-Appellant by books by three separate authors and three separate publishers*, is ultimately from a judgment entered against her in the District Court on the basis that this second action against Defendants-Appellees St. Martin's and Hessel, based on the same alleged copyright infringement as her first action against them, was barred by the doctrine of res judicata. The appeal from that judgment was, in turn, dismissed by the Court of Appeals for the Second Circuit. This Court should dismiss this appeal with respect to Defendants-Appellees St. Martin's and Hessel since it is clearly beyond the jurisdiction of this Court, the questions presented are insubstantial and are not in need of further argument, there was no error in the court below, no federal questions are presented and there is no other reason for this Court to entertain jurisdiction or to consider the questions raised by Plaintiff-Appellant on this appeal.

The Proceedings Below

This action is the second action brought by Plaintiff-Appellant against Defendants-Appellees St. Martin's and Hessel in the United States District Court for the Southern District of New York. The first action was commenced by a Summons and Complaint dated April 12, 1979, alleging that a work, authored by Defendant-Appellee Hessel and published by Defendant-Appellee St. Martin's

* The appeals already decided by this Court were Linden v. Dial Press, appeal dismissed and cert. denied, 442 U.S. 908 (1979); Linden v. Harper & Row Publishers, Inc., appeal dismissed and cert. denied, 444 U.S. 801 (1979); and Linden v. St. Martin's Press and Sidi Hessel, appeal dismissed and cert. denied, ___ U.S. ___, 101 S.Ct. 50 (1980).

entitled The Articulate Body, infringed upon the copyright of Plaintiff-Appellant in nine separate works. At the conclusion of a jury trial before Judge Milton Pollack, held on December 26 and 27, 1979, the jury, in response to special questions, found that there was no substantial similarity between The Articulate Body and any of the works of Plaintiff-Appellant. The District Court, therefore, directed a verdict for Defendants-Appellees. Judgment was entered dismissing the Complaint on December 31, 1979.

Thereafter, Plaintiff-Appellant sought to prosecute an appeal from this judgment in forma pauperis. Judge Pollack, who had presided at the trial, in his certification dated January 8, 1980 made in response to the inquiry of the pro se clerk, recommended that Plaintiff-Appellant not be allowed to appeal in forma pauperis because her claims were "completely baseless" and because she had lost at trial on questions of fact decided by a jury. In addition, Judge Pollack, in denying the motion of Plaintiff-Appellant to delay execution of the judgment for costs, described the action of Plaintiff-Appellant as "patently lacking in merit." (Order of February 19, 1980; emphasis in original).

The Court of Appeals for the Second Circuit denied the motion to appeal in forma pauperis and dismissed the appeal by an Order dated April 14, 1980.

This Court rejected Plaintiff-Appellant's purported appeal, dismissing the appeal for want of jurisdiction and, treating the papers as a petition for certiorari, denied certiorari. (___ U.S. ___, 101 S.Ct. 50 (1980)).

In a Complaint filed March 10, 1981, Plaintiff-Appellant then sought to bring a second action alleging the very same infringement by Defendants-Appellees St. Martin's and Hessel of

Plaintiff-Appellant's copyrights as had been alleged in the first action.* Chief Judge Lloyd F. MacMahon, finding Plaintiff-Appellant's new action asserted causes of action "identical" to those asserted in Plaintiff-Appellant's prior action, held that the doctrine of res judicata barred prosecution of the second action and dismissed the second action, brought in forma pauperis, as frivolous, pursuant to 28 U.S.C. §1915(d). (Memorandum and Order of March 10, 1981, 81 Civ. 1401) Accordingly, Chief Judge MacMahon also certified that an appeal from his order in forma pauperis "would not be taken in good faith because an appeal would be frivolous," pursuant to 28 U.S.C. §1915(a).

The Court of Appeals for the Second Circuit denied Plaintiff-Appellant's motion for leave to appeal in forma pauperis and dismissed the appeal by an Order dated June 25, 1981. By an Order dated July 13, 1981, that court also denied Plaintiff-Appellant's motion for reconsideration.

I.

THIS APPEAL SHOULD BE DISMISSED, OR THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

The Plaintiff-Appellant has filed a jurisdictional statement in this Court. However, this appeal is not within the jurisdiction of this Court, as it is not authorized by any statute or rule. Pursuant to Rule 16(a) of the rules of this Court, Defendants-Appellees St. Martin's and Hessel move to dis-

* In her first action against Defendants-Appellees St. Martin's and Hessel, the jury, in its response, to a special question, that there was no substantial similarity between the work written by Defendant-Appellee Hessel and published by Defendant-Appellee St. Martin's and any of the works of Plaintiff-Appellant, found that Plaintiff-Appellant had failed to establish the crucial factual element in her claim of copyright infringement. Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980 (1976); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).

miss this appeal with respect to them. In addition, pursuant to Rule 16(c) of the rules of this Court, the Defendants-Appellees St. Martin's and Hessel move to affirm the decision below on the ground that the questions raised are so insubstantial as not to warrant further argument. Hodges v. Snyder, 261 U.S. 600 (1923); City of Boston v. Jackson, 260 U.S. 309 (1922). The granting of such a motion is particularly appropriate in this case, which turns essentially on questions of fact and in which there is no clear error. Bodkin v. Edwards, 255 U.S. 221 (1921).

In this case the Plaintiff-Appellant appeals from the obviously factual determination that the cause of action in the second action against Defendants-Appellees St. Martin's and Hessel was based on the same factual predicate as the cause of action in the first action against them. Berlitz School of Languages of America, Inc. v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980). There is no doubt that Chief Judge MacMahon correctly concluded that the cause of action Plaintiff-Appellant seeks to litigate in this action is identical to the copyright infringement cause of action in the first action against Defendants-Appellees St. Martin's and Hessel. The Court of Appeals for the Second Circuit obviously agreed, denying the motion of Plaintiff-Appellant to appeal in forma pauperis and dismissing her appeal. It is also apparent that the questions raised are so wanting in substance as not to require further argument and that this is a case which turns essentially on questions of fact, both justifying affirmance of the determination of the Court of Appeals for the Second Circuit.

II.

THERE IS NO REASON TO GRANT A WRIT OF CERTIORARI IN THIS ACTION.

Pursuant to 28 U.S.C. §2103, this Court may treat an appeal improvidently taken as a petition for a writ of certiorari. However, in this action there exist no grounds supporting such a petition.

The rules of the Supreme Court provide that the granting of a writ of certiorari is within the discretion of the Court and merited only where "special and important reasons therefor" exist. Supreme Court Rule 19. In this case, no such special reasons exist: there is no conflict between or among the Courts of Appeals with regard to any question raised by this appeal; there is no important, but unsettled, question of federal law raised, no departure from the accepted or usual course of judicial proceedings has occurred; there is no question of state law involved; and there is no conflict beween the decision herein and any other decision of this Court.

The determination of Chief Judge MacMahon in this case was correct. No error was committed by the District Court in its judgment for Defendants-Appellees St. Martin's and Hessel nor by the Court of Appeals in dismissing the appeal from that judgment. There is no ground for granting a writ of certiorari in this case.

Conclusion

For the foregoing reasons, it is respectfully submitted that the appeal with respect to Defendants-Appellees St. Martin's and Hessel should be dismissed or, in the alternative, the judgment below should be affirmed. If the appeal should be treated

as a petition for a writ of certiorari, such petition should be denied.

Dated: August 28, 1981

Respectfully submitted,

SZOLD & BRANDWEN, P.C.

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